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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-75-72

CLYDE FITCH and SHARON FITCH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 74-.....

CLYDE FITCH and SHARON FITCH,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the Judgment of the United States District Court for the Southern District of Ohio, Eastern Division, which awarded Thirty-One Thousand Six Hundred Sixty-One Dollars ($31,661.00) in damages under the Federal Tort Claims Act for wrongfully inducting petitioner Clyde Fitch into the Armed Forces.

A. OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is included in the Appendix, infra, at p. A-1.

The opinion of the District Court is unreported and is included in the Appendix at p. A-6.

B. JURISDICTION

The date of the judgment of the United States Court of Appeals for the Southern District of Ohio was April 15, 1975 which was also the date of entry. No motion for rehearing or other application has been filed which would extend the time of filing this petition.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, United States Code, Section 1254(1).

C. QUESTION PRESENTED FOR REVIEW

WHETHER NEGLIGENT INDUCTION OF PETITIONER INTO THE ARMED FORCES CONSTITUTES A MISREPRESENTATION UNDER THE EXCEPTION TO THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. 2680(h).

D. STATUTORY PROVISIONS INVOLVED IN THE CASE

1. 28 U.S.C. Section 2674:

"The United States shall be liable, respecting the provisions of this Title relating to Tort claims in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained or occurred provides, or has been construed to provide, for damages only punitive in nature, the

United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefits the action was brought, in lieu thereof."

2. 28 U.S.C. 2680(h):

"The provisions of this chapter and Section 1346(b) of this Title shall not apply to—

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights."

E. STATEMENT OF THE CASE

In November, 1969 a national lottery was held to determine the order in which men would be drafted into the Armed Forces. Petitioner's birth date entitled him to Random Selection Sequence Number 309 which should have guaranteed that he would not be drafted. An error at Local Board 69 in Inez, Kentucky resulted in the assignment of Random Selection Sequence Number 132 to petitioner without his knowledge. As a result, petitioner was drafted on July 13, 1970 and sent to the Republic of South Vietnam. On July 9, 1971 while in South Vietnam, petitioner was informed by an Army Sergeant that he had been mistakenly inducted and, in October, 1971, plaintiff was returned to the United States and discharged.

1. Summary of the Complaint

The first claim in this action is based upon the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and 28 U.S.C. Section 2671, et seq. It charges that the United

States, through the Selective Service System, negligently determined plaintiff's random selection sequence number and negligently assigned to petitioner the Random Selection Number 132.

Petitioner's date of birth was November 26, 1946 and, as a result, he should have been assigned random selection number 309.

As a result of the negligent assignment to petitioner of an erroneous random selection number, petitioner was drafted into the Armed Forces and suffered a substantial loss of earnings and earning power, was forced to leave his family causing mental distress, loss of consortium, and further, petitioner was sent to the Republic of South Vietnam placing him in unnecessary physical danger and causing him anguish, fear, humiliation, apprehension and physical and mental pain and suffering.

The second claim charges that plaintiff was negligently inducted into the Armed Forces.

The third claim charges that, although petitioner was informed that he had been erroneously inducted and that he had signed a request for discharge on July 28, 1971 and although the request was recommended for approval on July 31, 1971, the United States negligently failed to secure petitioner's discharge until October 12, 1971, three months after the error was discovered.

In the fourth claim petitioner, Sharon Fitch, wife of Clyde Fitch, charges that because of the negligent assignment of number 132 and the negligent induction of petitioner, Clyde Fitch, she suffered mental distress, fear, apprehension, humiliation and physical and mental pain and suffering; that she was deprived of the services, companionship and consortium of her husband and that she was,

therefore, required to undergo medical care for nervous exhaustion.

The ad damnum clause prays for judgment against the United States in the amount of Five Hundred Thousand Dollars ($500,000.00).

2. Proceedings Below

Trial was held on petitioner's complaint on February 11, 1974. The Court issued its findings of fact, opinion and conclusions of law on March 25, 1974 and found that the petitioner was negligently inducted and awarded him Thirty-One Thousand Dollars ($31,000.00) damages. Appendix at p. A-12.

Respondent appealed to the United States Court of Appeals for the Sixth Circuit, which appeal was heard by a panel consisting of Judges Weick, Celebrezze and Peck. The Circuit Court reversed the judgment of the District Court for the reason that petitioners' complaint "arose out of a negligent misrepresentation". Appendix at p. A-4.

F. REASONS FOR ALLOWANCE OF THE WRIT

This case presents a compelling reason for allowing the writ in that the issue is one of first impression and because the United States Court of Appeals for the Sixth Circuit has construed negligent induction into the Armed Forces as misrepresentation in a matter contrary to the controlling decisions of this Court.

1. Definition of Negligent Misrepresentation

Congress, by the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq. made the United States liable for the torts of its agents in the same manner and to the same

extent as a private individual under like circumstances. This Court has repudiated the argument that the United States cannot be liable in cases involving the military because an individual does not have the power of conscription. *Indian Towing* v. *United States*, 350 U.S. 61, 100 L. Ed. 48 (1955); *Rayonier* v. *U. S.*, 352 U.S. 110, 1 L. Ed. 2d 354 (1957); and *Fair* v. *United States*, 234 F. 2d 288 (1956).

Petitioners have established that the United States was negligent in inducting Clyde Fitch when his random selection number should have guaranteed that he not be inducted. However, the Court of Appeals determined that when the United States ordered Clyde Fitch to report for induction there was a misrepresentation falling under an exception to the Federal Tort Claims Act, Title 28, U.S.C. Section 2680(h):

> "Exceptions—The provisions of this chapter and Section 1346(b) of this Title shall not apply to—
>
> (h) any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit or interference with contract rights."

The Court of Appeals assumed without discussion that the order to report was a misrepresentation and found that such order constituted an exception to the Federal Tort Claims Act:

> ". . . Appellee's complaint 'arose out of' a negligent misrepresentation. It occurred when government agents misrepresented Clyde Fitch's obligation to enter the Army, telling him that he was required to serve when, in fact, he was free from that duty."

The Court of Appeals then determined that it was obligated to dismiss the Complaint:

> "We are under the same obligation to dismiss the complaint as the Supreme Court recognized in *Neustadt*: 'While we do not condone carelessness in government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the government's tort liability." 366 U.S. at 710-11. Appendix pp. A-4-A-5.

The Court's reliance on *U. S.* v. *Neustadt*, 366 U.S. 696 (1961) was, however, misplaced because *Neustadt* does not support a finding that wrongful inducion constitutes negligent misrepresentation. *Neustadt* was an action under the Federal Tort Claims Act for negligence in an FHA appraisal of real property. Relying on the government's negligent appraisal, plaintiffs purchased property at a price which turned out to be excessive. The Court, in *Neustadt*, defined negligent misrepresentation as used under the Federal Tort Claims Act. Headnote No. 4 summarized the findings of the Court:

> "4. Fraud 13(3)
>
> Tort of 'negligent misrepresentation' is failure to use due care in obtaining and communicating information upon which a party may reasonably be expected to rely in conduct of his economic affairs."

None of the elements of "negligent misrepresentation" as defined by *Neustadt* are present in the instant case:

> A. . . . FAILURE TO USE DUE CARE IN OBTAINING AND COMMUNICATING INFORMATION
> . . .

The Random House Dictionary of the English language defines "information" as:

> "Knowledge communicated or received concerning a particular fact or circumstance; news;"

The Court of Appeals in reversing the decision of the District Court found the failure to use due care in obtaining and communicating information in government agents telling Clyde Fitch that he was required to serve when, in fact, he was free from that duty. This telling that he was required to serve came to petitioner Clyde Fitch by way of an ORDER TO REPORT FOR INDUCTION dated June 18, 1970. This ORDER warns:

> "Willful failure to report at the place and hour of the day named in this order subjects the violator to fines and imprisonment."

Petitioner submits that this ORDER TO REPORT FOR INDUCTION was not the communication of knowledge or news but was a legal order with which Clyde Fitch had to comply. The order did not merely inform Clyde Fitch of facts or news, but with the force of law, required that he report for induction. Therefore, because there was no obtaining and communicating of *information*, there could not have been a misrepresentation.

B. . . . UPON WHICH A PARTY MAY REASONABLY BE EXPECTED TO RELY . . .

In June, 1970 Clyde Fitch received his orders to report for induction. His failure to report as ordered would have been a violation of the Selective Service Act and would have subjected him to fines and imprisonment. Under these circumstances, Clyde Fitch had no opportunity to "rely" or to "not rely" upon the information that he was ordered to report for induction. The United States did not reasonably expect Clyde Fitch to rely on the information that he was to report because Clyde Fitch had no oppor-

tunity and no freedom to make any choices based on reliance. Where there is no opportunity to make an intelligent choice among options, there can be no reliance and, therefore, no misrepresentation as defined by this Court in *Neustadt*.

C. . . . IN CONDUCT OF HIS ECONOMIC AFFAIRS.

The *Restatement of Torts* defines negligent misrepresentation in terms of business and economic transactions:

> "Section 552(1)—One, who, in the course of his business, profession or employment, or a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on such information if he fails to exercise the reasonable care of competence in obtaining or communicating the information."

Negligent misrepresentation has not been applied prior to this case to matters other than those involving freely made contracts or involving business transactions. Petitioner, Clyde Fitch, was not involved in a business or economic transaction and did not have any options among which he could freely choose. This matter, not involving a business transaction or a freely made contract, is not one which has been determined to be misrepresentation and, therefore, this fact pattern does not constitute an exception to the Federal Tort Claims Act as misrepresentation.

The cases cited by the Court of Appeals in reversing the decision of the District Court were cases involving business transactions where the plaintiffs freely relied on information provided to them. In *Neustadt*, plaintiffs were home purchasers who freely relied on an appraisal pro-

vided to them by the Federal Housing Authority. There was a business transaction, a communication of information of the value of the real estate, and reliance in the decision to purchase the property.

Hall v. *United States*, 274 F. 2d 69 (1959), cited by the Court of Appeals was an action under the Federal Tort Claims Act for damages resulting from cattlemen being given information that their cattle were diseased and in reliance thereon, sold the cattle at reduced prices. In *Rey* v. *United States*, 484 F. 2d 45 (5th Cir. 1973), the Department of Agriculture erroneously informed plaintiff that his hogs were infected with cholera. Plaintiff relied on this information and injected his hogs with live cholera virus vaccine. The hogs were, in fact, not infected but did become infected from the vaccine and died. There was a business transaction, a communication of information and a reliance on that information. These cases and the definition of negligent misrepresentation that they apply, namely, the communication of information upon which a party can rely in the conduct of his economic affairs, do not support a finding that petitioner's wrongful induction was negligent misrepresentation.

2. Petitioner's Cause of Action Arose Upon His Negligent Induction

The Court of Appeals found that the government's negligence occurred when government agents misrepresented Clyde Fitch's obligation to enter the Army. Clyde Fitch was told to report for induction by letter dated June 18, 1970. On July 13, 1970, petitioner was inducted. Petitioner submits that the government's negligence and therefore his cause of action arose after any "misrepresentation" and, therefore, such "misrepresentation" is not relevant to his wrongful induction or to his claim under the Federal Tort Claims Act.

In *U. S.* v. *Kauten,* 133 F. 2d 703 (1943), defendant was prosecuted for neglecting to appear for induction. Defendant answered that he was a conscientious objector and that he should not have been ordered to report. In affirming the conviction, the Court of Appeals held that, even though the local draft and appeal boards may have committed an error in law in classifying defendant as a man available for combat service, his rights were not abridged because he had not been subjected to military "training and service after formal induction into the Army."

The Court in *Kauten,* held that although the defendant may have been erroneously ordered to report, such *order* was not an abridgement of his rights. The Court held that any abridgement of rights comes, not from the order to report, but from the formal induction into the Army. In the instant case, petitioner's cause of action did not arise from the "misrepresentation" that he was to report for service. His injury and damage resulted from his negligent *induction.*

3. Failure to Secure Speedy Discharge

The Court of Appeals determined that the 28 U.S.C. Section 2680(h)—misrepresentation exception to the Federal Tort Claims Act applied to petitioner Clyde Fitch's claim for wrongful induction. The Court of Appeals did not rule on petitioner's claim for damages for the negligent failure to secure his removal and discharge until three months following the discovery of his wrongful induction. There were no representations relating to Clyde Fitch's discharge and there could not have been any misrepresentations in that regard. The negligent failure to secure Clyde Fitch's discharge until three months after the discovery of the original negligence does not fit under the misrepresentation exception to the Federal Tort Claims Act.

G. CONCLUSION

For the foregoing reasons it is submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals. In addition it is suggested that this matter be remanded to the District Court for reconsideration of the award of punitive damages.

Respectfully submitted,

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H. AFFIDAVIT OF SERVICE

SWORN STATEMENT

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

I, Frank J. Neff, attorney for Petitioners Clyde Fitch and Sharon Fitch, having first been duly cautioned and sworn, hereby depose and state that in compliance with Rule 33, Rules of the Supreme Court of the United States, I served copies of the foregoing petition for a Writ of Certiorari by mailing in a secure wrapper, postpaid, to counsel for the defendant as follows:

On the United States by mailing a copy in a duly addressed envelope to William Milligan, United States Attorney, Room 200, 85 Marconi Boulevard, Columbus, Ohio; to Richard A. Olderman, Department of Justice, Washington, D. C. 20530; and to the Solicitor General, Department of Justice, Washington, D. C. 20530.

Further affiant saith not.

/s/ FRANK J. NEFF
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50 West Broad Street, Suite 1515
Columbus, Ohio 43215
Telephone: (614) 221-4221
Attorneys for Petitioners

Sworn to and subscribed in my presence this 25 day of June, 1975.

/s/ DAVID DACHNER
DAVID DACHNER
(Seal) Notary Public

My commission has no expiration date.

APPENDIX

No. 74-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLYDE FITCH AND SHARON FITCH,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio,
Eastern Division

Decided and Filed April 15, 1975.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

CELEBREZZE, Circuit Judge. This is an appeal from an award under the Federal Tort Claims Act. The District Court ordered the United States to pay Appellees $31,661 in compensatory and punitive damages for wrongfully inducting Clyde Fitch into the Armed Forces. The United States argues that two exceptions to the Act apply, that Appellee Clyde Fitch was contributorily negligent, and that an award of damages is inappropriate even if liability is found. Because we find that the misrepresentation exception to the Act bars liability, we reverse.

In November 1969, a national lottery was held to determine the order in which young men would be drafted into the Armed Forces. Clyde Fitch received number 309, which should have guaranteed that he not be drafted. An error at Local Board 69 in Inez, Kentucky resulted in transcription of his number as 132. Eligible men with this number were inducted. Clyde Fitch received his induction notice and, after losing an appeal based on his wife's pregnancy and financial hardship, he reported for active duty on July 13, 1970. While stationed in Viet Nam, on July 9, 1971, Fitch was informed by an Army sergeant that his induction had been a mistake because of the erroneous assignment of his lottery number. Three months later he was discharged from active duty. Fitch was not relieved of his military obligations, however, because he was induced by Army personnel to sign an Army Reserves agreement.

The District Court held that the erroneous assignment of Fitch's lottery number established the United States' liability under the Federal Tort Claims Act, 28 U.S.C. § 2674. It assessed $11,661 in damages representing lost wages. It also held that Appellees had established "a right to punitive damages and such damages are assessed at $20,000." Finally, the District Court stated that Fitch's Reserve agreement "was obtained by misrepresentation" and held that the agreement "is void and [Fitch] is hereby relieved of the obligations thereof."

We agree with the District Court that just as citizen owes Government an obligation to aid in its defense, so Government owes citizen the duty of fair, equitable, and just treatment. While we sympathize with Appellees' plight and cannot condone the negligence which caused Clyde Fitch's induction, we must reverse the award because

the District Court acted beyond the authority Congress has given it.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, *et seq.*, is a broad waiver of the federal government's immunity from liability for the torts of its employees while acting in the scope of their employment. The Act contains various exceptions, however,[1] and in construing the Act the courts must "carry out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy." *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953).

Under 28 U.S.C. § 2680(h), Congress has chosen not to allow the courts to consider "any claim arising out of . . . misrepresentation." We must construe this term according to "the traditional and commonly understood legal definition of the tort." *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961). It is settled that this exception includes claims arising out of negligent as well as intentional misrepresentation. *Neustadt.*

Although Appellees cast their complaint in the guise of a negligence action, this does not automatically take the case outside the misrepresentation exception. Courts must "look beyond the literal meaning of the language to ascertain the real cause of complaint." *Hall* v. *United States*, 274 F.2d 69, 71 (10th Cir. 1959), *quoted with approval, United States* v. *Neustadt*, 366 U.S. at 703.

In *Hall*, the plaintiff sold his cattle at a market loss after Government inspectors mistakenly reported that his cattle were diseased. Hall argued that the inspectors' negligent testing rather than the erroneous report had

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1. *See* 28 U.S.C. § 2680.

caused his loss and sued the United States under the Act. The Tenth Circuit rejected this attempt to avoid the misrepresentation exception, stating:

> Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease. . . . This stated a cause of action predicated on a misrepresentation. 274 F.2d at 71.

As in *Hall*,[2] Appellees' complaint "arouse out of" a negligent misrepresentation. It occurred when Government agents misrepresented Clyde Fitch's obligation to enter the Army, telling him that he was required to serve when, in fact, he was free from that duty. We are under the

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2. The Circuits have uniformly applied this analysis in barring actions which arose out of misrepresentations by Government employees. *Rey* v. *United States*, 484 F.2d 45 (5th Cir. 1973) (negligent misrepresentation that hogs were diseased, resulting in innoculations which killed several hogs); *Reamer* v. *United States*, 459 F.2d 709 (4th Cir. 1972) (misrepresentation that plaintiff could defer active duty until completion of law school semester if he enlisted, resulting in monetary loss upon earlier order to active duty); *Mizokami* v. *United States*, 414 F.2d 1375 (Ct. Cl. 1969) (negligent misrepresentation that spinach was contaminated, resulting in harm to business); *DeLange* v. *United States*, 372 F.2d 134 (9th Cir. 1967) (communicated misdiagnosis by physician); *Vaughn* v. *United States*, 259 F.Supp. 286 (N.D. Miss. 1966) (misrepresentation of pipeline placement on Government map, resulting in explosion upon impact of plaintiff's dragline); *Steinmasel* v. *United States*, 202 F.Supp. 335 (D.S.D. 1962) (misrepresentation of deadline for requesting veterans benefits, resulting in ineligibility for educational benefits); *Anglo-American & Overseas Corp.* v. *United States*, 242 F.2d 236 (2d Cir. 1957) (misrepresentation that tomato paste could be imported as in compliance with FDA standards, resulting in destruction of goods as unsafe after their importation); *National Mfg. Co.* v. *United States*, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954) (misrepresentation of weather and flood information, resulting in property damage); *Clark* v. *United States*, 218 F.2d 446 (9th Cir. 1954) (misrepresentation of safety from flood of town built as a war project); *Jones* v. *United States*, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954) (misrepresentation of amount of oil estimated to be on land, resulting in sale of stock at market loss).

same obligation to dismiss the complaint as the Supreme Court recognized in Neustadt:

> While we do not condone carelessness by government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability. 366 U.S. at 710-11.

Because of our holding, we need not address Appellant's other contentions. We note, however, that the District Court awarded punitive damages in contravention of the explicit bar of punitive awards stated in 28 U.S.C. § 2674. We point out, furthermore, that the District Court had no jurisdiction to relieve Clyde Fitch of his Reserve obligations, recognizing as it did that his Reserve agreement "was obtained by misrepresentation."[3] Finally, we observe that our action dismisses Appellees' complaint for lack of jurisdiction and does not jeopardize their opportunity to secure compensation from Congress for the injustice that befell them.[4]

The Judgment of the District Court is reversed, with direction that an order be entered dismissing the complaint.

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3. The Federal Tort Claims Act merely authorized damage awards for certain claimants and does not give the federal courts the right to exercise the powers of a court of equity to void agreements between the United States and private parties. 28 U.S.C. § 1346(b). We express no view on the merits of Fitch's claim that his Reserve contract was improperly obtained, as this complaint should be pressed through proper channels.

4. After the Supreme Court ordered the dismissal of the complaint in *Dalehite* v. *United States*, 346 U.S. 15 (1953), for example, the aggrieved parties obtained relief by way of Congressional action. 69 Stat. 707; H.R. Rep. No. 2024, 83d Cong., 2d Sess. (1954); S.Rep. No. 2363, 83d Cong., 2d Sess. (1954); H.R. Rep. No. 1305, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 1623, 84th Cong. 1st Sess. (1955); S. Rep. No. 684, 84th Cong., 1st Sess. (1955), *cited in Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

C2 72-455

CLYDE FITCH, et al,
Plaintiffs

v.

UNITED STATES OF AMERICA,
et al,
Defendants

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed March 25, 1974)

This matter is before the Court after trial of the above matter, the presentation of evidence and testimony and upon memoranda supplied to the Court. Based upon the foregoing evidence and such memoranda, the Court does file herewith its findings of fact, opinion and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

I

FINDINGS OF FACT

1. Plaintiff registered for Selective Service on or about November, 1964, with Selective Service Board No. 69, Inez, Kentucky. As a result of the national lottery held pursuant to Presidential Proclamation 2945, dated November 28, 1969, (34FR19017), he was entitled to receive random selection number 309, such number being assigned to those registrants born on November 26th. Instead, he

was assigned by Local Board 69 the random selection number 132. Such random selection numbers determined the order in which otherwise eligible men were drafted in the armed forces.

2. By reason of the erroneous assignment of random selection number 132, plaintiff was inducted into the armed forces of the United States on July 13, 1970. But for such erroneous assignment of random selection number, plaintiff would not have been inducted into the armed forces of the United States. No registrant holding random selection number 309 was inducted by Local Board 69, Inez, Kentucky, either in 1970 or at any time thereafter.

3. Pursuant to such induction, plaintiff served in the armed forces of the United States from July 13, 1970, to October 12, 1971, a total of fifteen (15) months. Included in such service was six months and twenty-seven days served in Viet Nam. During his period of service plaintiff was paid no more than $270.00 per month, or a maximum of $4050.00. No evidence of the monetary value of clothing, food, shelter, and other benefits supplied has been presented.

4. Approximately July 9, 1971, the error of plaintiff's induction was discovered and his discharge ordered. Such discharge was not effected until October 12, 1971. At the time of such discharge plaintiff was not relieved of his obligation to serve as a member of the Armed Forces Reserve. Plaintiff was denied a choice of remaining or not remaining in such Reserve and was misled by agents of the United States as to his obligation.

5. When inducted into the armed forces, plaintiff was employed as a shift foreman at the Microplastics Company, Columbus, Ohio, at an hourly wage of $3.20. Upon his return he was reemployed at $3.20 per hour at a lesser

position. At the time of his return, shift foremen were receiving $4.25 per hour. Plaintiff lost as wages during the period of induction $10,706.00 plus $5005.00 by being reemployed at a lower scale from October, 1971, to June, 1973.

6. By reason of plaintiff's entry into the armed forces, his wife and child were unable to maintain the standard of living they had enjoyed prior to such induction and were required during a portion of the period of his service to reside with relatives.

7. While plaintiff was unable to make installment payments as required, no property of his was repossessed nor any default judgments obtained against him. Plaintiff was unable to make monthly installment payments on an automobile and interest on the unpaid balance was charged against him during the period of his service. No evidence has been presented as to the dollar amount of damages sustained by him.

8. While in service, plaintiff was trained and served as a truck mechanic and received a maximum net pay of $270.00 per month. Such pay included an award for service overseas and an award for hazardous duty although plaintiff was not at any time in actual combat. As an honorably discharged veteran plaintiff is now and will for the balance of his life be entitled to veterans' benefits including preference in hiring, veterans bonuses, educational opportunities, and favorable mortgage loans. No evidence has been presented as to the dollar value of such benefits nor can the value of future benefits be ascertained at this time.

II

OPINION

Insofar as the Court has been able to determine, this is a matter of first impression. We must depend, therefore, upon logic and reason without the guidance of other and wiser decisions.

There must be an initial reluctance for any court to award damages to a citizen called upon to serve his country. Almost from the dawn of history it has been recognized that ablebodied young men have a duty to contribute to the security of their nation by bearing arms and by participating in wars over which they had no control. Until quite recently, the young men who were called upon to serve were unable even to cast their vote for the very public officials who determined whether or not this nation required defending. An award of damages for so serving appears to run counter to this basic obligation.

Plaintiff was required to leave a job, he was separated from his wife and child, and he was required to remain in military service for fifteen months. He received in return education and training, medical services for himself and family and compensation including quarters, meals, and clothing which approached the level of compensation he had received in civilian life. Plaintiff is now an honorably discharged veteran of the armed forces of the United States. He has veterans' preference in the taking of civil service examinations, the services of the Veterans Administration, the right to a preferential mortgage loan, to continued medical services and to all bonuses, pensions and other benefits that may be awarded either by the State of Ohio or by the United States.

It should not be assumed that this recitation of benefits is intended to cast the problem in the form of a financial transaction. Whatever else it may be, this is not such a transaction to which the principles of contract are applicable.

There is no doubt that citizens owe a duty to this country—a duty to obey laws, a duty to bear arms, and a duty to preserve, protect and defend the Constitution of the United States. The recitation of duties of citizens, however, should not obscure the duties of country to citizens. This concept was best expressed by James Madison in the following words: "We have heard of the impious doctrine in the old world that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape, that the solid happiness of the people is to be sacrificed to the view of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued and that no form of government whatever has any other value than as it may be fitted for the attainment of this project . . ." Federalist Papers No. 45.

This concept was carried into the very bedrock of our Republic by the following words in the Declaration of Independence: "That to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed . . ."

Whatever else may be embraced in this concept of government, it must be at the very least that the United States of America is required to deal fairly, equitably and justly with its citizens.

The Congress of the United States in its wisdom and the President of the United States in his, established a system wherein some but not all of the ablebodied young men of this country would be called upon to serve in the armed forces. The plaintiff was not one of those who would have been called. Only by the negligence and carelessness of agents of the United States government was he required to serve. The evidence is clear that the random sequence number 132 was given to him erroneously in place of the number 309 to which he was entitled. The sole evidence presented to the Court of any action by the United States after learning of its error was a letter by the secretary of the draft board who expressed "regret." The Court also notes that while Selective Service found its error prior to July 9, 1971, plaintiff was not discharged from service until October 12, 1971, a matter of some three months. Is the plaintiff then limited to a letter of "regret"? We think not.

This plaintiff was deprived of his freedom to come and go as he chose, to have the companionship of his wife and child, to select his own job, and to follow the vocation of his choice, whether or not it might be the most lucrative vocation that he could select.

We hold that citizen Clyde Fitch did not receive fair, just and equitable treatment at the hands of the United States of America and that because of the negligence of an agent of the United States of America, he is entitled therefore to damages.

III

CONCLUSIONS OF LAW

A. This Court has jurisdiction of the matter at hand in accordance with the Federal Torts Claim Act, 28 U.S.C. §2671 and in accordance with 28 U.S.C. §1346(b).

B. Plaintiff has sustained damages caused by the negligent act of an employee of the government while acting within the scope of his office.

C. Plaintiff has established by a preponderance of evidence a compensable loss of $11,661.00, being the total wages lost by plaintiff during his period of induction less wages paid to him by the United States.

D. Plaintiff has established by a preponderance of the evidence a right to punitive damages and such damages are assessed at $20,000.00.

E. Damages in the total sum of $31,661.00 are awarded to plaintiff against the defendant United States of America.

F. Plaintiff's agreement to remain in the Armed Forces Reserve was obtained by misrepresentation. Any such agreement by plaintiff, therefore, is void and he is hereby relieved of the obligations thereof.

G. In accordance with 28 U.S.C. §2678, Frank J. Neff, attorney at law, and the law firm of Barkan, Barkan & Neff, are entitled to and are hereby awarded the sum of $6,332.00, being 20% of the amount recovered herein. Such sum to be paid out of but not in addition to the amount of judgment hereby awarded.

It is so ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-72

CLYDE FITCH AND SHARON FITCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Clyde Fitch received number 309 in the November 1969 national draft lottery. The number, as later events revealed, was sufficiently high to exempt him from military service. However, a transcription error at his local draft board resulted in the recording of his number as 132, and Fitch was subsequently drafted into the United States Army. One year later the processing error was discovered by the Selective Service System during a routine audit. Fitch was discharged from active duty three months thereafter (Pet. App. A-2).

After Fitch's discharge, petitioners brought this suit under the Federal Tort Claims Act seeking both compensatory and punitive damages. The district court found the government negligent and awarded petitioners $11,661 in compensatory damages and $20,000 in punitive damages (Pet. App. A-6 to A-12). The court of appeals reversed (Pet. App. A-1 to A-5), holding that petitioners' complaint arose out of a negligent misrepresentation and hence was

not a claim cognizable under the Tort Claims Act because of the specific exception for claims of "misrepresentation" provided in 28 U.S.C. 2680(h).[1] The court further held that the district court's award of punitive damages was improper in view of the express bar against such awards in 28 U.S.C. 2674.

2. In *United States* v. *Neustadt*, 366 U.S. 696, this Court held that neither negligent nor intentional misrepresentations by the United States are actionable under the Federal Tort Claims Act. The Court further held that this bar cannot be circumvented through allegations of negligence when the gravamen of the complaint is misrepresentation. The instant case arose out of the alleged negligent misrepresentation to Fitch by his draft board of his obligation to enter the Army. The court of appeals thus correctly determined that the Act afforded petitioners no remedy.

Petitioners argue (Pet. 9-10), however, that the misrepresentation exception is applicable only to cases involving transactions of a business or financial character. While it is true that the facts of *Neustadt*—an appraisal by the F.H.A. of real property—involved a subject matter of a commercial nature, this Court did not hold that the misrepresentation exception is confined to cases where the complaint arises out of a business transaction. Petitioners appear to rest their argument upon the last footnote in *Neustadt*, where the Court noted that Dean Prosser, in the 1941 edition of his

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[1]28 U.S.C. 2680(h) excludes from the coverage of the Act "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

treatise on torts, had observed that " '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings' " (366 U.S. at 711, n. 26). But the purpose of that footnote was simply to clarify that the "misrepresentation" exception did not immunize the government from the type of negligence claim presented in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (involving the Coast Guard's failure to maintain navigational aids). Accordingly, the lower federal courts, in decisions subsequent to *Neustadt*, have not read the misrepresentation exception as applying only to business dealings. For example, in *Reamer* v. *United States*, 459 F.2d 709, the Fourth Circuit denied recovery for an alleged breach of a military enlistment contract on the ground that, to the extent the case sounded in tort, it fell within the misrepresentation exception of Section 2680(h). And in *DeLange* v. *United States*, 372 F.2d 134, the Ninth Circuit found a physician's communicated misdiagnosis also to be a misrepresentation within the meaning of the statute.

But even if the misrepresentation exception of the Act were to be confined solely to interests of a commercial character, petitioners' complaint nevertheless would be barred by the false imprisonment exception of Section 2680(h).[2] The gravamen of petitioners' complaint is that

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[2]Prosser describes the tort of false imprisonment in the following terms (Prosser, *The Law of Torts* §12, p. 57 (1964 ed.)):

> The restraint may be by means of physical barriers, or by threats of force which intimidate the plaintiff into compliance with orders. It is sufficient that he submits to an apprehension of force reasonably to be understood from the conduct of the defendant, although no force is used or even expressly threatened.

the United States wrongfully deprived Fitch of "his freedom to come and go as he chose" (Pet. App. A-11). That allegation states a claim of false imprisonment with respect to which the United States has not waived its sovereign immunity.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[3]Moreover, even if Fitch's claim were cognizable under the Federal Tort Claims Act, his recovery, as the government argued in the courts below, should be barred by his own contributory negligence. Fitch testified that he watched the lottery drawing on television, and knew that it affected him; he knew that there were only 365 numbers and that he received number 309 (Court of Appeals Appendix, which we are lodging with the Clerk, pp. 50-51). Nevertheless, he never questioned his being called by his draft board even though there were public announcements that no one holding a number above 240 would be taken. But for his own negligent failure to bring this error to the attention of his draft board, Fitch would not have been drafted.

Petitioners further contend (Pet. 11) that after the discovery of Fitch's wrongful induction the United States failed to discharge him speedily from active duty. But petitioners failed to raise this issue in the court of appeals and therefore are precluded from raising it here. *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, decided April 28, 1975, slip op. 28; *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 96, n. 9; *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312.